IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 04 - 029**
CHAD FRANK	**:**	

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by its attorneys, Patrick L. Meehan, United States Attorney for the Eastern District of Pennsylvania, and Manisha M. Sheth, Assistant United States Attorney, respectfully submits this sentencing memorandum in the above captioned action.

BACKGROUND

A. Introduction

Defendant Chad Frank is charged in a superseding indictment with the following offenses: (i) one count of conspiracy to violate 18 U.S.C. §§ 2251 and 2252, in violation of 18 U.S.C. § 371 ("Count One"); (ii) five counts of employing, using, persuading, enticing, or coercing any minor to engage in, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, in violation of 18 U.S.C. § 2251(a) ("Counts Two through Six"); (iii) eleven counts of knowingly receiving and distributing any visual depiction that has been transported in interstate commerce where the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct, in violation of 18 U.S.C. §§ 2252(a)(2) ("Counts Seven through Seventeen"); and (iv) one count of knowingly possessing one or more films, videotapes, or other matter which contain any visual depiction of sexually explicit conduct

with a minor that has been transported in interstate commerce, or which was produced using materials which have been transported in interstate or foreign commerce, in violation of 18 U.S.C. §§ 2252(a)(4) ("Count Eighteen"). These charges arise out of defendant's production, distribution, receipt, and possession of child pornography.

B. Factual Background

This investigation was commenced as a result of information obtained from a search warrant executed by the Australian Queensland Crime and Misconduct Commission at the home of an individual named Wayne Verdun George ("George"). A review of the computers seized from George's residence revealed that George was a member of a network of twelve international pedophiles from Australia, the United Kingdom and the United States, who regularly communicated and shared images of child pornography on the Internet. Several members of this network would attend organized gatherings for groups of Boy Lovers.[1] These gatherings would take place at hotels, usually ones with swimming pools, in various parts of the country. One of the members of this network was the defendant, Chad Frank ("Frank").

Defendant Frank (i) created images of child pornography with children he was related to or acquainted with; (ii) transmitted images of child pornography through the internet; (iii) requested and received images of child pornography through the internet; (iv) exchanged information about ways of abusing children, including molesting them while they are sleeping and drugging them to avoid them waking up while they are being molested; (iv) sexually molested several young children, including his 2-year old male cousin; (v) offered to take

[1] According to the BoyChat website, Boy Lover ("BL") is "a label chosen by men with a physical, emotional, and psychological attraction to prepubescent boys, who do not believe that loving relationships with boys are damaging, so long as the interests of the boys are respected."

photographs of children being abused according to the tastes of other pedophiles; (vi) organized gatherings for groups of Boy Lovers where members could meet children and exchange child pornography; and (vii) directed and encouraged his girlfriend, co-defendant Michelle Foisy to take sexually explicit photographs of young children and photograph him abusing young children.

1. The Production of Child Pornography

Counts Two through Six of the Superseding Indictment arise from the defendant's production of child pornography. The visual depictions produced by the defendant involved five prepubescent male children involved in sexually explicit conduct. The images pertaining to each victim are described below:

a. Victim "L":

The defendant produced a total of fifteen visual depictions of victim "L" involving sexually explicit conduct. Victim "L" is the four-year old cousin of the defendant.[2] In fact, some of these images show that the victim is still in diapers at the time these images were produced. Fourteen of these images were photographs and one was an eight millimeter videotape. These photographs show contact between the genitals of defendant Frank and victim "L," masturbation of victim "L" by the defendant, and lascivious exhibition of the genitals of victim "L." These images show that the defendant perpetrated these acts on the victim while he was sleeping. The videotape shows the defendant sexually molesting victim L while he was sleeping.

[2] At the time the images were produced by the defendant, victim "L" was only two-years old.

b. *Victim "AF"*

The defendant aided and abetted the production of one visual depiction of victim "AF" involving sexually explicit conduct. Victim "AF" is the seven-year old cousin of defendant's girlfriend, co-defendant Foisy.[3] At defendant's direction, co-defendant Foisy took a total of eight photographs of "AF." In the first four photographs, "AF" is fully clothed. The fifth, sixth, and seventh photographs show the victim's pajamas being unzipped to reveal his underwear. The last image (the only charged image) shows the lascivious exhibition of the genitals of victim "AF" while he was sleeping. Co-defendant Foisy sent all eight images of "AF" to the defendant using the internet. On or about March 30, 2002, defendant distributed these images to George through the internet.

c. *Victims "JP" and "MP"*

The defendant produced a videotape of sexually explicit conduct between him and victims "JP" and "MP." Victim "JP" and "MP" are eight and six years old respectively. The defendant was friends with the victims' mother, and would often watch her children for her. The videotape depicts sexually explicit conduct between the defendant and the two prepubescent victims, which took place in the defendant's bedroom. For example, in the video, the defendant masturbates JP until the child gets an erection. The behavior and reaction of the victims during this video makes clear that this was not the first time that the defendant sexually molested these young boys.

[3] At the time the images were produced, victim "AF" was five-years old.

d. *Victim "MS"*

On this same videotape, the defendant secretly recorded victim "MS" while he changed from his swim trunks. The videotape focused on the victim's genitals. Victim "MS" is a nine-year old boy who would spend time in Frank's care. Indeed, the following internet relay chat from September 8, 2001 makes clear what defendant's intent is with regard to "MS":

Frank:	but he is going to be my new yf
Frank:	but he's been molested before
Frank:	oh yeah he trusts me so much that he wants to spend the night with me
Frank:	he lives in the city, i live in the suburbs
George:	oh well that at least is something , better than not knowing when you might see him - maybe he can sleep over when he
Frank	he want to, only problem is he has seizures
George:	Has the boy got a daddy at hom?
Frank:	no, and his step dad molested him
Frank:	thing is, all of my boys need me
George:	He is so lucky to have found you and he obviously wants to be with you - I could see that in the one pic you sent
Frank:	you could now?
George:	You are spreading yourself a bit thin - I may have to stay over there to lend a hand hehe
George:	It just seemed to be there in the way he looked - like he was having fun and totally at eae
George:	ease
Frank:	he was, and at the end of the night I had him resting his head in my lap

2. The Receipt and Distribution of Child Pornography

Counts Seven through Seventeen of the Superseding Indictment arise from the defendant's receipt and distribution of child pornography. As a member of an international network of twelve pedophiles from Australia, the United Kingdom and the United States, Frank regularly communicated and exchanged images of child pornography on the Internet. From on or

about November 28, 2001 to June 20, 2002, the defendant received and distributed a total of approximately 236 images of prepubescent minors engaging in sexually explicit conduct, using the internet. Several of these images depicted anal penetration of prepubescent children by adult males or foreign objects or oral sex with prepubescent children by adults. See Counts Seven, Eight, and Eleven of Superseding Indictment.

3. The Possession of Child Pornography

Count Eighteen of the Superseding Indictment arises from the defendant's possession of child pornography. On October 2, 2003, the defendant possessed a computer, a floppy disk, and two videotapes which contained approximately twenty images of minors engaging in sexually explicit conduct. These materials and images are described in Count Eighteen and were recovered from the defendant during the execution of the search warrant in this case.

ARGUMENT

A. Statutory Maximums

1. *Conspiracy – 18 U.S.C. § 371*

The maximum statutory penalty for violating 18 U.S.C. § 371 is five years imprisonment, a $250,000 fine, a three-year period of supervised release, and a $100 special assessment.

2. *Production of Child Pornography – 18 U.S.C. § 2251(a)*

The applicable maximum statutory penalty for Counts Two through Six, is twenty years imprisonment, with a mandatory minimum of ten years imprisonment, a three-year period of supervised release, and a $100 special assessment.[4]

3. *Receipt and Distribution of Child Pornography – 18 U.S.C. § 2252(a)(2)*

Because Counts Seven through Seventeen took place before April 30, 2003, the defendant faces a maximum statutory penalty of fifteen years imprisonment, a $250,000 fine, a three- year period of supervised release, and a $100 special assessment.

4. *Possession of Child Pornography – 18 U.S.C. § 2252(a)(4)(B)*

Because Count Eighteen took place after April 30, 2003, the maximum statutory penalty for violating 18 U.S.C. § 2252(a)(4) is ten years imprisonment, a $250,000 fine, a three-year period of supervised release, and a $100 special assessment.

5. *Total Maximum Statutory Sentence*

Defendant's total maximum sentence would consist of 280 years imprisonment, with a mandatory minimum of ten years imprisonment, $4,500,000 fine, three years supervised release, and an $1800 special assessment.

B. Sentencing Guideline Calculation in the PSR

The Presentence Investigation Report ("PSR") lists six groups.

Counts One, Two, Four, and Six are grouped together in Group 1 because they all involve victim "L." The base offense level is 27 pursuant to section 2G2.1(a). A four level

[4] The government is not able to prove that the video referenced in count six was produced after April 30, 2003.

enhancement is added under section 2G2.1(b)(1)(A) because the victim was under the age of twelve. A two-level enhancement is added under section 2G2.1(b)(2) because the victim was related to the defendant. The final offense level for Group 1 is 33.

Counts One and Three are grouped together in Group 2 because they all involve victim, "AF." The base offense level is 27 pursuant to section 2G2.1(a). A four level enhancement is added under section 2G2.1(b)(1)(A) because the victim was under the age of twelve. A two-level enhancement is added under section 2G2.1(b)(2) because the victim was under the custody, care, or supervisory control of the defendant and co-defendant Foisy. The final offense level for Group 2 is 33.

Counts One and Five are grouped together in Group 3 because they all involve victim, "JP." The base offense level is 27 pursuant to section 2G2.1(a). A four level enhancement is added under section 2G2.1(b)(1)(A) because the victim was under the age of twelve. A two-level enhancement is added under section 2G2.1(b)(2) because the victim was under the custody, care, or supervisory control of the defendant. The final offense level for Group 3 is 33.

Counts One and Five are grouped together in Group 4 because they all involve victim, "MP." The base offense level is 27 pursuant to section 2G2.1(a). A four level enhancement is added under section 2G2.1(b)(1)(A) because the victim was under the age of twelve. A two-level enhancement is added under section 2G2.1(b)(2) because the victim was under the custody, care, or supervisory control of the defendant. The final offense level for Group 4 is 33.

Counts One and Five are grouped together in Group 5 because they all involve victim, "MS." The base offense level is 27 pursuant to section 2G2.1(a). A four level enhancement is added under section 2G2.1(b)(1)(A) because the victim was under the age of twelve. A two-level enhancement is added under section 2G2.1(b)(2) because the victim was under the custody, care, or supervisory control of the defendant. The final offense level for Group 5 is 33.

Counts Seven through Seventeen group with Count Eighteen under section 3D1.2(d) to create Group 6. The base offense level for Group 6 is 17 pursuant to section 2G2.2(a). The following specific offense characteristics are applicable: (i) a two-point enhancement under section 2G2.2(b)(1) for minors under the age of 12; (ii) a five-point enhancement under section 2G2.2(b)(2)(B) for the distribution of child pornography in exchange for the receipt or expectation of receipt, of a thing of value; (iii) a four-point enhancement under section 2G2.2(b)(3) for sadistic or masochistic conduct; (iv) a five-point enhancement under section 2G2.2(b)(5) for a pattern of activity involving the sexual abuse of a minor; (v) a two-point enhancement under section 2G2.2(b)(5) for the use of a computer; and (vi) a three-level enhancement under section 2G2.2(b)(6) for the number of images. The final offense level for Group 6 is 38.

Pursuant to section 3D1.4, the group with the highest offense level is counted as one unit and any group that is five to 8 levels less serious is counted as ½ unit. Here, Group 6 receives one unit and Groups 1 through 5 each receive ½ unit, resulting in a total of 3 ½ units or four levels. Thus, the combined adjusted offense level is 42. Defendant receives a three-point reduction for acceptance of responsibility, resulting in a final offense level of 39. The sentencing

guideline range based on a final offense level of 39 and a criminal history category of I is 262 to 327 months.

C. Defendant's Objections to the PSR

First, defendant makes several factual objections to the PSR. Most of these objections can be refuted by defendant's admissions contained in the internet relay chat with Wayne Verdun George, the testimony of co-defendant Michelle Foisy, and the images recovered in this case. A chart summarizing each of the defendant's objections and the evidence which refutes it is attached at Tab 1.

Second, defendant also argues that the four point enhancement under section 2G2.2(b)(3) is inapplicable because (i) the images in question do not portray sadistic or masochistic conduct; (ii) the images in question were not possessed by the defendant; (iii) the government has not established that the defendant intended to receive the images in question.

The files entitled "Jason.zip" described in Count Seven, "GerberLubesUp" described in Count Eight, and "bfpic.zip" and "morebf.zip"described in Count Eleven contain images of pre-pubescent boys being anally penetrated by adults and foreign objects, and thus serve as the basis for the enhancement for sadistic or masochistic conduct under section 2G2.2(b)(3). Circuit courts consistently have held that the anal or vaginal penetration of a young child is a sufficiently painful act to warrant the enhancement for sadistic or masochistic conduct. See United States v. Diaz, 368 F.3d 991, 991 (8th Cir. 2004) (affirming application of enhancement under section 2G2.2(b)(3) when images depicted vaginal or anal penetration of a prepubescent minor by an adult); United States v. Myers, 355 F.3d 1040, 1043-44 (7th Cir. 2004) (same); United States v. Hall, 312 F.3d 1250, 1261-63 (11th Cir. 2002) (same); United

States v. Rearden, 349 F.3d 608, 615-16 (9th Cir. 2003) (same); United States v. Kimler, 335 F.3d 1132, 1143 (10th Cir. 2003) (same); United States v. Fuller, 77 Fed. Appx. 371, 2003 WL 22331999, at *10 (6th Cir. 2003) (unpublished) (same); United States v. Lyckman, 235 F.3d 234, 238-39 (5th Cir. 2000) (when image depicts adult male engaging in sexual intercourse with young girl, conduct shown is sufficiently painful, coercive, abusive, and degrading to qualify as sadistic or violent under section 2G2.2(b)(3)); United States v. Delmarle, 99 F.3d 80, 83 (2d Cir. 1996) (anal penetration of eight or nine year old boy was likely to cause pain and be sadistic within the meaning of section 2G2.2(b)(3)).[5]

In addition, it is irrelevant that defendant did not possess these files at the time he was arrested. Rather, the internet chat relay proves that these files were sent by George to Frank and were accepted by Frank. See Tab 2 (attached excerpt from internet relay chat log for November 28, 2001 (Count Seven), December 13, 2001 (Count Eight), and May 14, 2002 (Count Eleven)). The defendant's mere receipt of such images is sufficient to establish the applicability of the enhancement for material portraying sadistic or masochistic conduct. See United States v. Canada, 110 F.3d 260 (5th Cir. 1997). In addition, co-defendant Foisy is expected to testify that she saw several of these images on the defendant's computer.

Finally, the circuits are split on whether the enhancement for sadistic masochistic conduct has an intent requirement. Compare Diaz, 368 F.3d at 991 (citing United States v. Wolk, 337 F.3d 997, 1008 (8th Cir. 2003) (holding that section 2G2.2(b)(3) has no express intent

[5] Defendant's argument that the enhancement under section 2G2.2(b)(3) constitutes impermissible double counting is not supported by the case law. See United States v. Myers, 355 F.3d 1040 (7th Cir. 2004) (noting that enhancement for sadistic or masochistic conduct did not constitute double dipping even though defendant also received enhancement for prepubescent victim).

requirement)); United States v. Richardson, 238 F.3d 837, 840-41 (7th Cir.2001) (observing that sentencing enhancements are generally imposed on the basis of strict liability rather than a defendant's intentions) with United States v. Kimbrough, 69 F.3d 723, 734 (5th Cir. 1995) (finding sufficient evidence to conclude that the defendant intentionally ordered and possessed pornography depicting sadistic conduct and affirming enhancement); United States v. Tucker, 136 F.3d 763, 764 (11th Cir.1998) (per curiam) (adopting reasoning of the Fifth Circuit and holding that intent is a necessary requirement of a § 2G2.2(b)(3) enhancement).

In addition, the structure of section 2G2.2 shows that when the Sentencing Commission wanted to have a requirement of intent, it stated so. For example, sections 2G2.2(b)(2)(A) and (B) require that the defendant have a particular state of mind when he distributes the images - for pecuniary gain in the case of section (2)(A) and in payment for images already received or in expectation of the receipt of images in the future in the case of section (2)(B). Section 2G2.2(b)(2)(C) requires distribution to a minor and the Application Note says that distribution to a minor means "the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing that the individual is a minor at that time." Section 2G2.2(b)(2)(D) requires distribution to a minor "that was intended to" seduce the minor. Thus, when the Sentencing Commission wanted to include an intent or knowledge requirement, it clearly stated such a requirement. In contrast, section 2G2.2(b)(3) states only that the offense "involves" sadistic or masochistic images. There is no language requiring either knowledge or intent. Clearly, while the defendant has to know that he has images of children engaging in sexually explicit conduct, he is not required to know that the images contain sadistic or masochistic conduct. The only issue is whether, objectively speaking, these images portray

sadistic or masochistic conduct or other depictions of violence. Thus, although the Third Circuit has not yet addressed this issue, given the plain language of the section 2G2.2(b)(3), and the practice of applying sentencing enhancements on the basis of strict liability, the government urges this Court to adopt the reasoning of the Seventh and Eighth Circuits and not engraft an intent requirement on section 2G2.2(b)(3).

Third, defendant also contends that the two point enhancement under section 2G2.2(b)(1) is inapplicable because the defendant did not intend to receive and possess material depicting prepubescent minors under the age of twelve. The defendant has failed to cite, and the government has not been able to find, any case from the Third Circuit or the Eastern District of Pennsylvania in which the court held that section 2G2.2(b)(1) has an intent requirement. In fact, the plain language of the enhancement does not require any intent on the part of the defendant. Indeed, defendant's reliance on United States v. Kimbrough is unavailing. See Def.'s Mem. at 8 (citing United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995). In that case, the Fifth Circuit did not hold that section 2G2.2(b)(1) has an intent requirement, but rather overruled defendant's objection that the government had not presented evidence that defendant had intended to receive materials involving prepubescent minors under the age of twelve in light of the sufficient evidence to the contrary. Kimbrough, 69 F.3d at 734. Similarly, in this case, the internet relay chat log is replete with electronic conversation where the defendant expressed his interest in material involving prepubescent children. See Tab 3 (containing excerpts from December 13, 2001 chat, March 30, 2002 chat, April 25, 2002 chat, April 30, 2002 chat).[6]

[6] To the extent that section 2G2.2(b)(1) has an intent requirement, the government need only prove that the defendant displayed a reckless disregard for the ages of the subjects. United States v. Fox., 248 F.3d 394 (5th Cir. 2001).

Fourth, defendant's argument that the government must offer expert testimony to prove that the images involved minors under the age of twelve is entirely without legal basis. There is no requirement that expert testimony be presented in child pornography cases to establish the age of the children in the pictures. United States v. Nelson, 38 Fed. Appx. 386, 392 2002 WL 463321, at * 4 (9th Cir. 2002). In fact, the courts have made clear that the where the images themselves provided sufficient evidence of prepubescence, the government is not required to present expert testimony on the matter. See United States v. Kimler, 335 F.3d 1132, 1144 (10th Cir. 2003) (not error for district court determine that an image depicts a prepubescent child without having first heard expert testimony on the issue); United States v. Deaton, 328 F.3d 454, 455-56 (8th Cir. 2003) (holding that imposition of two-level enhancement under section 2G2.2(b)(1) was appropriate when pictures themselves supported the district court's determination that images were plainly of children under age twelve). Indeed, in Kimler, the district court reviewed the selected trial exhibits and overruled a similar objection, noting that "common knowledge and experience is generally sufficient to identify a minor as prepubescent. Kimler, 335 F.3d at 1144. Similarly, a review of the images involved in this case will lead this court to conclude that the children depicted in these images show no adult development and thus, are so obviously less than twelve years old, that expert testimony on the issue would not be helpful to the Court.[7]

Finally, defendant also objects to the PSR on the ground that the sentencing enhancements are precluded by the Supreme Court's decision in Blakely v. Washington, 124 S.

[7] The presence of only one image of a prepubescent minor is sufficient to support the enhancement under section 2G2.2(b)(1). United States v. Fox, 248 F.3d 392 (5th Cir. 2001).

Ct. 2531 (2004). Contrary to defendant's argument, the Third Circuit has not addressed whether Blakely applies to the federal guidelines. See Def.'s Mem. at 2 (citing United States v. Dickerson, 2004 U.S. App. 17986 (3d Cir. 2004)). Nowhere in the Dickerson opinion does the Court hold the Blakely applies to the federal sentencing guidelines. Moreover, the parties in that case conceded that no Blakely-related problems are likely to arise on the facts of that case. Id. at *20 n.9.

Although the government addresses defendant's argument regarding Blakely in greater detail in Section D below and preserves the arguments raised therein, it respectfully requests that this Court conduct a sentencing trial to determine whether the government has proven each of the applicable enhancements beyond a reasonable doubt. The defendant has agreed to waive any right to a jury trial on the sentencing enhancements and has agreed to have this Court make such findings. See Tab 5 (copy of unexecuted stipulation). At the sentencing, the government anticipates introducing the testimony of co-defendant Michelle Foisy, the testimony of ICE Special Agent Megan Negron, the internet relay chat between the defendant and George, and the images and videotapes recovered in this case. In addition, the government also requests that the Court specify whether it is making its findings as to each applicable enhancement under a "beyond a reasonable doubt" or a "preponderance of the evidence" standard.

D. Potential Blakely Issues

1. Blakely Does Not Apply to the Federal Sentencing Guidelines

It is the government's position that the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004) did not invalidate the federal sentencing guidelines, nor did

it hold that its rule applies to the guidelines. See 124 S. Ct. at 2538 n.9 ("[t]he Federal Guidelines are not before us, and we express no opinion on them"). This argument is presented in greater detail in the Government's Supplemental Sentencing Memorandum attached hereto at Tab 4.[8]

If the Court were to agree with this argument, the defendant should be sentenced within the applicable guideline range of 262 to 327 months based on a final offense level of 39 and a criminal history category of I. See Section B above.

2. If Blakely Applies to the Guidelines, then the Guidelines Are Not Severable and Should Not Apply at All

a. *Guidelines Enhancements And The Procedures For Applying Them Are Not Severable From The Guidelines As A Whole.*

If the Court disagrees with the government's argument and holds that Blakely applies to the guidelines, then the Court must decide how sentencing is to be conducted. The guidelines contain many "enhancement" provisions -- i.e., provisions that provide for a higher offense level or that authorize an upward departure from a defendant's guidelines sentencing

[8] In any event, Blakely would not apply to the ten-year mandatory minimum in this case. In McMillan v. Pennsylvania, 477 U.S. 79 (1986), the Court upheld a statutory scheme which permitted a judge to impose a mandatory minimum sentence if he or she found a particular fact (in that case, the visible possession of a firearm). The Court emphasized that this factor did not increase the statutory maximum penalty, it merely limited the court's discretion in sentencing within the penalty range allowed by statute. Id. at 87-88. Following Apprendi, the Supreme Court held that McMillan remains intact. Harris v. United States, 536 U.S. 545, 565 (2002) (holding that "the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.) Many cases have since recognized that, under Harris, a sentencing judge may make all pertinent findings regarding a mandatory minimum sentence. See, e.g., United States v. King, 345 F.3d 149, 151-52 (2d Cir. 2003); United States v. Cristobal, 293 F.3d 134, 147 (4th Cir. 2002); United States v. Solis, 299 F.3d 420, 454 (5th Cir. 2002); United States v. Helton, 349 F.3d 295, 299-300 (6th Cir. 2003); United States v. Souffront, 338 F.3d 809, 827 (7th Cir. 2003); United States v. Hitchcock, 298 F.3d 1021, 1021 (9th Cir. 2002); United States v. Bennett, 329 F.3d 769, 778 (10th Cir. 2003). Blakely did not overrule Harris, but rather cited it in support of its central holding that a judge's imposition of sentence must be within the range allowed by the jury's verdict. 124 S. Ct. at 2537. Accordingly, the Harris rule remains applicable, permitting a judge at sentencing to find facts pertinent to a statutory mandatory minimum sentence by a preponderance of the evidence. Accord United States v. Lucca, 377 F.3d 927, 934 (8th Cir. 2004) (Blakely does not apply to the application of a statutory mandatory minimum sentence).

range based on particular factual findings. If Blakely applies to the guidelines, then absent a waiver by the defendant, those enhancement provisions (except for provisions based on prior convictions, see Almendarez-Torres v. United States, 523 U.S. 224 (1998)) generally could be applied in a given case only if, contrary to the current system of judge-made findings, the necessary facts have been found by a jury beyond a reasonable doubt. Provisions that reduce a defendant's sentencing range or authorize a downward departure, however, could still be applied, as intended, by a court at sentencing based on findings by a preponderance of the evidence. Harris v. United States, 536 U.S. 545 (2002); see also Blakely, 124 S. Ct. at 2538 (rule does not apply to cases involving "sentencing scheme[s] that imposed a statutory minimum if a judge found a particular fact"); McMillan v. Pennsylvania, 477 U.S. 79 (1986).

A requirement that enhancing -- but not reducing -- facts have to be submitted to the jury and proven beyond a reasonable doubt would distort the operation of the sentencing system in a manner that would not have been intended by Congress or the Sentencing Commission. Accordingly, rather than attempting to apply the guidelines with a Blakely overlay of jury factfinding, a court should simply conclude that the parts of the guidelines system that are unconstitutional (finding of sentence-enhancing facts by the judge) are not severable from the guidelines as a whole. The result is that, in any case in which Blakely precludes judicial factfinding under the guidelines, the guidelines as a whole would be invalidated as a binding set of rules governing the sentence that must be imposed.

When a court finds some parts of a statutory scheme unconstitutional, the court must inquire into the severability of the remaining provisions. The court of course "should refrain from invalidating more of the statute than necessary." Alaska Airlines, Inc. v. Brock, 480

U.S. 678, 684 (1987). Accordingly, "[w]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of th[e] court to so declare, and to maintain the act in so far as it is valid." Id. But where the remaining provisions are not severable, they too are rendered invalid by the holding of unconstitutionality.

The question whether the unconstitutional provisions are severable turns on an assessment of whether Congress would have enacted the provisions that remain constitutional absent the others. See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."). As the Supreme Court has stated the rule, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not, the invalid part may be dropped if what is left is fully operative as law." Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932); INS v. Chadha, 462 U.S. 919, 932, 934 (1983) (same; noting that what remains after severance of unconstitutional legislative veto is "'fully operative' and workable administrative machinery" and therefore is severable).

Under those principles, the "relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress" after the unconstitutional provisions have been severed. Alaska Airlines, 480 U.S. at 685. If the statute will not function in a manner Congress intended, then the entire statute must be eliminated, and the basic policy choices in designing a new, constitutional scheme left up to Congress. The court has no authority to "rewrite [the] statute and give it an effect altogether different" from what Congress enacted. Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330, 362 (1935).

When Congress enacted the Sentencing Reform Act, there is no doubt that the system Congress had in mind was one based on determinations by courts, not juries, of facts necessary for sentencing. And there is no doubt that the Commission structured the guidelines for use in such a system. Eliminating the parts of the guidelines scheme that would be unconstitutional if Blakely applies to the guidelines would leave a remainder that is not severable -- i.e., that could not operate in the manner that Congress intended. For that reason, in any case in which Blakely-type procedures would have to be applied to determining facts necessary for guidelines enhancements, the guidelines as a whole would no longer be applicable as binding authority.

The fact that Congress intended the guidelines to be applied by judges at sentencing, not by juries, is explicit in Congress's basic command to the Sentencing Commission to promulgate a set of guidelines. 28 U.S.C. § 994(a)(1) ("The Commission . . . shall promulgate and distribute to all courts . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case.").

The provisions for appeal similarly establish Congress' intent that courts -- not juries -- should make the factual determinations necessary to apply the Guidelines. Under 18 U.S.C. § 3742(d), courts of appeals "shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and . . . shall give due deference to the district court's application of the guidelines to the facts." Moreover, Congress provided for courts on appeal to determine "whether the sentence . . . was imposed in violation of law" or "was imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. § 3742(c); those

standards are obviously directed at sentencing courts, and the statute makes no provision for review of jury verdicts. Similarly, Congress provided for equal rights of appeal for the government and the defendant, 18 U.S.C. § 3742(a) and (b), although government appeals of jury factual findings at a criminal trial are ordinarily impossible under the Double Jeopardy Clause. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). See also Comprehensive Crime Control Act of 1983, Sen. Rep. No. 98-225, at 65 (projected guidelines "are designed to structure judicial sentencing discretion"); id. at 155 (noting importance of appellate review, which is "crucial to the functioning of the sentencing guidelines").[9]

The guidelines are not only designed for application by judges, but their consideration by juries would be inconsistent with the normal standards of a jury trial.[10] Under the guidelines, sentencing determinations are made by judges by a preponderance of the evidence; the reasonable doubt standard applicable to jury findings is entirely absent. As the Commission explained, "use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." U.S.S.G. § 6A1.3 comment. See also United States v. Watts,

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[9] See also U.S.S.G. § 1B1.2 (provision clearly directed to courts (not juries) to "[d]etermine" facts relevant to application of the guidelines); U.S.S.G. § 1B1.2 app. note 2 (guidelines manual "directs the court, once it has determined the applicable guideline . . . under § 1B1.2(a) to determine any applicable specific offense characteristics (under that guidelines) and any other applicable sentencing factors pursuant to the relevant conduct definition in § 1B1.3.") (emphasis added); Fed. R. Crim. P. 32(i) (setting forth procedure for court to resolve issues under the guidelines at sentencing).

[10] The government here sets forth at length the reasons why jury determinations of sentencing enhancements are incompatible with the guideline system devised by Congress. Nevertheless, while maintaining this legal position, the government is now endeavoring in pending cases to submit sentencing enhancement issues to juries. While it is not believed that this approach will be wholly satisfactory in vindicating the goals of the Sentencing Guidelines to impose consistent sentences, the government views this step as necessary in the wake of Blakely to protect against absurd sentences which would result if a court rejects all of our legal arguments and elects to impose only those guideline provisions supported by a jury verdict or a defendant's admission.

519 U.S. 148, 155 (1997) (per curiam) (noting "the significance of the different standards of proof that govern at trial and sentencing" under the guidelines).

Further, like any sentencing determination, determinations on guidelines enhancements were intended to be made by the court based on evidence that may not be admissible before a jury under ordinary rules of evidence. See 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); U.S.S.G. § 6A1.3 (sentencing court in resolving disputed issues "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy"); Fed. R. Evid. 1101(d)(3) (Federal Rules of Evidence not applicable in sentencing proceedings).

Moreover, the Sentencing Commission clearly did not set base offense levels or fashion adjustments to those levels to account for an asymmetrical factfinding regime, under which enhancements would be applicable if a jury found them present beyond a reasonable doubt, while reductions would be applicable if the court found them present by a preponderance of the evidence. Altering the system by requiring a different factfinder -- and a different standard of proof -- for sentence enhancements would fundamentally distort the system.

If the Commission had understood that the government would have the burden of establishing a particular enhancing fact beyond a reasonable doubt, it might have modified the substance of the enhancement to account for the increased burden and difficulty of establishing that fact. For example, intent, purpose, or other mental-state requirements to establish various

enhancements might have been reduced or modified. Or the Commission might have increased base offense levels for particular guidelines across the board and allowed the defendant, for specified reasons, to seek mitigation of the guidelines range, in a proceeding before a judge in which the defendant bore the burden of proof. Congress might have taken similar action if it had desired to stiffen sentences for certain crimes. Countless provisions of the guidelines thus might have been crafted differently, in order to account for the asymmetrical difficulty that the government would encounter in meeting its burden of proof, and the increased administrative costs of affording a jury trial.

The Supreme Court made a similar point in Patterson v. New York, 432 U.S. 197 (1977). In that case, the Court noted that "in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty." Id. at 207. "The State," the Court noted, "was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment." Id. Under the Sentencing Guidelines, the burdens placed on the government to obtain a particular sentence were fashioned in light of the understanding that the government would have to meet a preponderance standard, in a showing to a judge unconstrained by formal rules of evidence. It is not knowable what alterations the Commission might have made to the guidelines to account for the risk that a jury-trial right and a burden of proof beyond a reasonable doubt on facts that increase a sentence would result in potentially inadequate and disparate sentences.

Thus, a system under which guidelines enhancements (but not reductions) have to be submitted to a jury for determination beyond a reasonable doubt would contravene the clear intent of Congress and the Sentencing Commission. To be sure, a sentencing system that incorporated jury findings on some factual issues with judicial findings on others could be created. But it is not "within the province of the courts to fashion a remedy," United States v. Jackson, 390 U.S. 570, 579 (1968), that would depart so dramatically from Congress' intent (and that of the Sentencing Commission) in the unified Sentencing Guidelines as promulgated. Although "[s]tatutes should be construed to avoid constitutional questions," this "interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." United States v. Albertini, 472 U.S. 675, 680 (1985). To do so, "while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1 of the Constitution." Id. As the district court recently concluded in United States v. Croxford, 324 F. Supp. 2d 1230 (D. Utah 2004), adding a jury overlay to application of Sentencing Guidelines would "effectively require[] the courts to redraft the sentencing statutes and implementing Guidelines." Id. at 1243.

There has never been any determination by Congress, the Sentencing Commission, or any other body that the sentences that resulted from such a patchwork system would be the just and appropriate sentences that satisfied the goals of sentencing as set forth by Congress. Congress set forth a number of goals in the Sentencing Reform Act. It provided that "[t]he purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code," to

"provide certainty and fairness in meeting the purposes of sentencing [and] avoiding unwarranted sentencing disparities," and to "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b); see 18 U.S.C. § 3553(b).

The Sentencing Commission designed the guidelines, including the sentencing ranges, to provide for sentences that satisfied those goals when the guidelines were applied by judges under the existing system. Neither Congress nor the Commission has ever made any determination that the sentences that resulted from applying enhancements (but not reductions) only if they were first proven to a jury beyond a reasonable doubt would be just or appropriate sentences for the crimes at issue. They might be too low (because some enhancements simply could not as a practical matter be proven to a jury) or they might be too high (because presumably a reviewing court could not overturn a jury verdict on the applicability of an enhancing fact with the same ease that it could overturn a judge's finding on that fact). But either way, there is no reason to believe that applying the guidelines in this way would result in sentences that the Commission (or Congress) believed were appropriate. See U.S.S.G. § 1B1.11 ("The Guidelines Manual in effect on a particular date shall be applied in its entirety.").

Whether sentences under such a regime are too low or too high, the indisputable fact is that in a large number of individual cases they would not be the sentences envisioned by Congress and the Sentencing Commission. Perhaps more importantly, the sentences rendered nationwide under such a regime would indisputably not occupy the same comparative range as sentences rendered under the Guidelines as written. Given the central concerns of Congress and the Sentencing Commission -- to rectify perceived sentencing disparities, and to ensure, within the limits of the judicial and political processes, sentences within the statutory minima and

maxima which accurately reflect Congress' perception of a just sentence -- it is not reasonable to believe that such a retroactively re-engineered sentencing system is what Congress intended. Congress and the Commission were quite clear about what they intended. The truncated sentencing regime resulting from application of Blakely to guideline decision-making is quite clearly not what Congress and the Commission intended.

Among the most important goals of the Sentencing Reform Act was "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Relatedly, the guidelines themselves embody a system under which defendants are punished based in large measure on the real facts of the case, not merely the offense that the prosecutor has charged. If the guidelines are applied with a Blakely overlay requiring submission of enhancing (but not other) facts to the jury, then those features of the system cannot be realized. It would likely be impossible, as a practical matter, to charge and prove to a jury beyond a reasonable doubt all enhancing factors in all cases. Even were all of the manifest difficulties overcome, and all sentencing enhancement issues under the guidelines submitted to juries, the differences between fact-finding by one federal judge under a preponderance standard and 12 lay jurors under a reasonable doubt standard make it clear beyond any doubt that in a very large number of cases the results would be quite different than those contemplated under the guidelines as written. Again, there is simply no reason to believe that this comports with the intent of Congress or the Sentencing Commission. Moreover, the result would be to change the guidelines' intended creation of a system of reliance in part on the defendant's real offense into a system in which the court is precluded in large part (as to

enhancing factors, at least) from relying on the defendant's real offense and would have to rely on the charged offense instead.

In short, the scheme that would result from trying to superimpose the jury system on enhancements (but not reductions) under the guidelines would put in place a scheme that is so different from what Congress enacted (and the Sentencing Commission thought it was promulgating) that it would in essence be judicial lawmaking, not effectuation of congressional intent. In those circumstances, the proper remedy is to permit Congress to make the policy choices necessary to put into place a constitutional sentencing system.

The practical difficulties with a system in which enhancements (but not reductions) under the guidelines could be applied only based on jury findings beyond a reasonable doubt would be severe, and they demonstrate that neither Congress nor the Sentencing Commission would have enacted the resulting system or intended that it should be applied.

First, because the factors that go into a guidelines sentence were intended to be applied by judges, not juries, they are not well-suited to submission to juries. The result of attempting to submit them to juries could be extraordinary complexity, followed by lengthy and extensive appellate proceedings to determine whether the jury had been correctly instructed.

Typically, juries have to make a few factual determinations on the limited number of elements of an offense in order to determine whether a defendant is guilty. Those elements have usually been refined through years of judicial decisions, and the instructions given to juries have become standardized. The sudden addition of numerous guidelines enhancements to the list of facts that juries must decide could dramatically complicate the task of instructing juries and obtaining valid verdicts. As Judge Cassell recently explained in Croxford, "the list of findings

contemplated by the Guidelines is extensive and nuanced, modified and interpreted regularly in numerous court opinions, creating a task much better suited to judges than to juries." 324 F. Supp. 2d at 1243. A bank robbery case, for example, could require

> a jury to determine factors regarding the nature of the offense [under U.S.S.G. § 2B3.1] such as (1) the nature of the institution robbed; (2) the presence of, brandishing of, or other use of, a firearm; (3) the making of a death threat; (4) the presence of ordinary, serious, or permanent or life threatening bodily injury; (5) any abduction; (6) any physical restraint; (7) the taking of a firearm; (8) the taking of drugs; and (9) the value of property taken; and further factors [under Chapter 3B of the Guidelines] regarding the defendant's role in the offense such as (10) aggravating role; (11) mitigating role; (12) abuse of a position of trust; (13) use of a special skill; and (14) use of a minor; and further factors [under Chapter 3A of the Guidelines] regarding the victim such as (15) hate crime motivation; (16) vulnerable victim; (17) official victim; (18) terroristic motivation; and further factors concerning (19) obstruction of justice [under § 3C1.1]; and (20) acceptance of responsibility [under § 3E1.1] -- not to mention another dozen or so grounds for departing upward or downward from the general guidelines calculations.

Croxford, 324 F. Supp. 2d at 1254. The jury would have to be instructed correctly on each of these factors, and the jury's verdict would presumably be subject to reversal on appeal if the instructions were incorrect. See also United States v. Medas, No. 03 CR 1048 (E.D.N.Y. July 1, 2004).

Another very serious problem would arise under the complex "relevant conduct" rules under U.S.S.G. § 1B1.3. The guidelines provide that the base offense level and offense characteristics should be determined not only on the basis of the offense of conviction, but also on the basis of all of the defendant's "relevant conduct." That includes acts undertaken by others that are "aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant" and, in the case of conspiracy offenses, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1). Aside from the difficulty of instructing a jury on the quite complex issues arising in applying

these definitions, see U.S.S.G. § 1B1.3 commentary (eight-page commentary on relevant conduct rules), requiring jury determinations on relevant conduct could take a criminal trial into areas far afield from the core question that is suitable for jury resolution -- whether the defendant committed the particular crime with which he was charged.

Upward departures that are not based on specific guidelines provisions provide another example of the unsuitability of the current guideline manual to jury resolution. Such departures are permissible based on "an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [in the Guidelines]." 18 U.S.C. § 3553(b); see U.S.S.G. § 5K2.0. It is difficult to see how a jury could be instructed to make a finding about whether such a circumstance existed, and any instruction that could be envisioned would face a very substantial objection that it is too vague to satisfy due process standards. The result could be the elimination of upward departures, although within the statutory sentencing range, for heinous conduct.

Another problem area arises under Chapter 3D of the guidelines, pursuant to which courts are to "group" similar counts and then sentence the defendant according to the offense level applicable to each resulting group -- a process that may result in a higher offense level based on the decision whether or not to group certain counts. See U.S.S.G. §§ 3D1.3 and 3D1.4. But the decision whether to group counts depends in part on very complex factual determinations, which were clearly not designed for submission to a jury. See, e.g., U.S.S.G. § 3D1.2(a) (group when counts "involve the same victim and the same act or transaction"), § 3D1.2((b) (group when counts "involve the same victim and two or more acts or transactions

connected by a common criminal objective or constituting part of a common scheme or plan"); U.S.S.G. § 3D1.2 commentary (explanation of grouping rules). In addition, the decision whether to group counts may increase the total offense level (and thus the total sentence). Thus, it may be that, if Blakely applies to the guidelines, grouping (or not grouping) could be applied only with appropriate jury instructions and submission of the factual issues to the jury. Those instructions could be exceptionally difficult for the court to formulate and for the jury to follow.

Many other provisions of great importance under the guidelines simply could not be effectively implemented if enhancing factors had to be charged in an indictment and submitted to the jury. For instance, the obstruction of justice enhancement, under U.S.S.G. § 3C1.1, is frequently applied when a defendant testifies falsely at trial. Yet at the time of indictment for the offense, the government will not know whether the defendant will testify falsely or commit other obstructive acts, and it will therefore likely be impossible to indict the defendant on the facts necessary for this enhancement or submit the issue of obstruction to the jury.

There are many other enhancing facts in individual cases that the government learns of only at or near trial or when a presentence report is prepared. Those facts too would apparently have to be omitted from the sentencing calculation, because they could not be included in the indictment and thus could likely not be submitted to the jury.

Even the core provision at U.S.S.G. § 1B1.11, that "[t]he court shall use the Guidelines Manual in effect on the date that the defendant is sentenced," cannot logically be applied in a system which rests in part on jury findings. That provision could not be put into effect if the guidelines provision at issue has changed between the time of jury deliberations and

the time of sentencing. The jury would have been instructed on the guidelines version in effect at that time, not at the time of sentencing.

An attempt to apply the guidelines subject to Blakely would also lead to absurd results in many cases, with sentencing courts bound to impose sentences that are far too short by any reasonable standard. That is not merely because sentencing decisions generally have never been required to be made under the beyond-a-reasonable-doubt standard and because requiring such proof of facts that enhance -- but not those that reduce -- the defendant's sentence would inevitably skew the result. In addition, the court in many cases already tried (or to which the defendant has already pleaded guilty) would be required to impose an absurdly low sentence because of the structure of the guidelines provisions themselves.

A good example would be the sentences that would result for those convicted of fraud and awaiting sentence. Under the guidelines, conviction of fraud results in a base offense level of 6 or 7 under U.S.S.G. § 2B1.1(a). That translates into a sentencing range of 0-6 months imprisonment (slightly higher for those with multiple prior convictions). The enhancements for amount of loss under Section 2B1.1(b)(1), however, can add up to 30 levels to the defendant's offense level, and many other enhancements under Section 2B1.1 may further increase the sentence. Most of those enhancements, however, would not ordinarily have been charged in the indictment or found by the jury, and they accordingly would be unavailable at sentencing if the guidelines were applied with the Blakely overlay requiring a jury verdict on enhancing factors. Accordingly, most defendants who commit fraud -- even multimillion dollar frauds with large numbers of victims and serious consequences for society -- would likely be limited to sentences of little or no jail time if the guidelines could be applied only with Blakely-type procedures for

enhancing factors. See also United States v. Shamblin, 323 F. Supp. 2d 757, 768 (S.D.W.Va. 2004) (reduction in drug case from 240 months imprisonment to "almost certainly inadequate" 12-month sentence under application of Blakely).

Such absurd results, as well as the other oddities described above in the submission to a jury of a system which was not designed for it, demonstrate that the guidelines would not "function in a manner consistent with the intent of Congress" if a court attempted to apply them with the Blakely overlay. Alaska Airlines, 480 U.S. at 685. Accordingly, if Blakely applies to the guidelines in any given case, which the government disputes, the provisions of the current sentencing system that would be unconstitutional are not severable from the remainder of the guidelines.

The Ninth Circuit has recently held that while the "procedural aspects of applying the Sentencing Guidelines" (i.e., application by the judge based on a preponderance of the evidence) are unconstitutional under Blakely, those aspects are severable –- and so, contrary to our argument, juries can be substituted for judges to determine guidelines enhancements under a heightened standard of proof. United States v. Ameline, 376 F.3d 967, 980-84 (9th Cir. 2004). In so ruling, the Court concluded that it was "inconsequential" that Congress envisioned a judge-based sentencing system. Id. at 982. What mattered, according to the Court, was that Congress' three overarching objectives –- "honesty, uniformity and proportionality" -– could still be achieved by having juries find relevant guidelines facts beyond a reasonable doubt. Id.

The Ninth Circuit miscast the severability inquiry. The question is not whether a system entirely different from what Congress intended might still achieve Congress' ultimate goals in enacting sentencing reform legislation. The question, rather, is whether the severed

statutory scheme (i.e., what remains absent the unconstitutional provisions) "will function in a manner consistent with the intent of Congress." Alaska Airlines, 480 U.S. at 685. Thus, Congress' intention regarding how its goals would be achieved is anything but inconsequential. Here, the manner in which Congress wanted the guidelines to be applied (by judges) is directly intertwined with what Congress quite specifically intended: a system of guidelines sentences taking into account a spectrum of sentencing factors relating both to offense and offender. To replace judge with jury would, as described above, seriously impair the ability to achieve such sentences.

There is another problem with the Ninth Circuit's formulation. By holding that guidelines facts must be proven to a jury beyond a reasonable doubt, the court did not simply "sever" away the guidelines procedures; it created entirely new ones. Whatever difficulties there ordinarily may be in divining Congress' intent, here it is perfectly clear that Congress did not intend that guidelines determinations would be made by juries. By venturing into such uncharted territory, Ameline raised far more questions than it answered. Will guidelines factors have to be charged in the original indictment, or will a separate sentencing information suffice? Will trials have to be bifurcated, with different proceedings on the substantive offense and sentencing factors? (There is no provision currently in federal statutes or rules addressing bifurcated sentencing proceedings, except in capital cases.) Do the rules of evidence apply at these new sentencing hearings? How are guilty pleas to be administered: may a defendant plead guilty only to the underlying offense, while reserving the right to contest sentence-enhancing facts? If so, is such a defendant eligible for an acceptance-of-responsibility adjustment under U.S.S.G. § 3E1.1, even though he has refused to admit conduct that forms part of the constitutionally defined

"elements" of his crime? How might the rules of criminal procedure and local rules have to be revamped to provide, for example, discovery on guidelines facts? There is no legislative mandate for the courts to develop or implement such a new "sentencing elements" guidelines scheme, and no legislative guidance on how it should be done.

The Ninth Circuit's solution requires the fashioning of an entirely new, complex and intricate procedural system that Congress did not enact. And that, the Supreme Court has made clear, exceeds the judicial function of interpreting a statute to save it from unconstitutionality:

> It is one thing to fill a minor gap in a statute -– to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure . . . for the sole purpose of rescuing a statute from a charge of unconstitutionality.

United States v. Jackson, 390 U.S. 570, 580 (1968) (refusing to create a judge-made procedural scheme for empaneling a capital sentencing jury to conduct a sentencing hearing after a defendant pleaded guilty to federal kidnaping, where Congress had not established such procedures); see also United States v. Albertini, 472 U.S. 675, 680 (1985) (although "[s]tatutes should be construed to avoid constitutional questions," this "interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.").

Accordingly, as explained above, the unavailability in a case of an appropriate sentencing enhancement factor under the procedural scheme devised by Congress warrants that the guidelines not be employed in that case at all, except as a permissive guide to the exercise of the judge's discretion.

b. *The Guidelines Remain Fully Applicable In Cases In Which Blakely Procedures Are Not Necessary.*

For the reasons given above, the guidelines as a whole are not severable from the procedures -- factual determinations by the judge, not the jury -- that Congress and the Sentencing Commission intended to be used in applying them. Accordingly, in any case in which the guidelines would require an upward enhancement of the defendant's sentencing range without a jury determination, the guidelines as a whole could not constitutionally be applied as mandatory sentencing rules. See Croxford, 324 F. Supp. 2d at 1242-48.[11] On the other hand, in cases in which the guidelines could constitutionally be applied as written without submitting any enhancing factors to the jury, the guidelines remain binding on sentencing courts.

If it applies to the guidelines, Blakely governs only a subset of the factual determinations that have to be made at sentencing -- those facts (other than the fact of a prior conviction) that are necessary for increases in the defendant's sentencing range above what would have been applicable based on the jury's factual findings alone.[12] In cases in which the court determines, based on a traditional application of the guidelines, that no such enhancements are applicable, it is entirely consistent with the Constitution for the guidelines to be applied as

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[11] On August 2, 2004, the Supreme Court granted certiorari in two cases to address this issue. Oral argument is scheduled for October 4, 2004. The cases are United States v. Booker, No. 04-104 (certiorari to the Seventh Circuit), and United States v. Fanfan, No. 04-105 (certiorari to the First Circuit before an appellate decision). The only reported decision to date on this point is United States v. Ameline, 376 F.3d 967, 980-84 (9th Cir. 2004), discussed earlier. In that case, upon finding that Blakely applies to the guidelines, a divided court further disagreed with the government and held that the guidelines are binding even when a particular enhancement may not be applied due to Blakely.

[12] Because judges may still, post-Blakely, find the fact of a prior conviction, see Blakely, 124 S. Ct. at 2536-37, the court could still constitutionally make most of the factual findings necessary to assign a defendant to a criminal history category under Chapter 4 of the guidelines, even if those factual findings increased the defendant's sentencing range.

written and intended. Accordingly, under 18 U.S.C. § 3553(b), courts would remain bound in such cases to sentence the defendant in accordance with the guidelines.

Some such cases will be those in which the jury's verdict establishes that the defendant is guilty of an offense and the court finds (based on a preponderance of the evidence) that there are no enhancements applicable under the particular facts of the case. In such cases, nothing stands in the way of the statutory directive that courts impose sentence in accordance with the guidelines by applying the base offense level and any applicable factors that would reduce the sentence. Similarly, in cases in which the jury necessarily decided facts in rendering its verdict that establish the applicability of a guidelines enhancement and the court finds no other enhancements applicable, the court should compute the sentence under the guidelines.

The guidelines also would remain applicable in any case (usually involving a guilty plea) in which the defendant has either stipulated to the facts necessary for application of the guidelines or has waived his right to a trial on those facts. As the Court explained in Blakely, "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." 124 S. Ct. at 2540. Indeed, "[e]ven a defendant who stands trial may consent to judicial factfinding as to sentence enhancements." Ibid. In short, because "nothing prevents a defendant from waiving his Apprendi rights," id., application of the guidelines in full continues to be fully constitutional -- and therefore required by Section 3553(b) -- where the defendant has done so.

c. *Where The Guidelines Cannot Constitutionally Govern The Court's Sentencing Decision, The Sentencing Court Must Nonetheless Give Due Regard To The Guidelines Sentence.*

In cases in which the court determines that the defendant's guidelines sentence turns on enhancements that have not been found by the jury, and the court has determined that Blakely requires such a finding, the guidelines could not constitutionally be applied as mandatory rules of law governing the sentence. In such cases, the court should sentence the defendant between the minimum and maximum sentences prescribed by statute, and it may find whatever facts it believes necessary to impose a sentence within that range. The Court in Blakely noted that indeterminate sentencing schemes, in which the judge "may implicitly rule on those facts he deems important to the exercise of his sentencing discretion," remain fully constitutional. 124 S. Ct. at 2540. Accordingly, the court would be free to make (by a preponderance of the evidence) whatever factual determinations are necessary in imposing sentence in a case in which the guidelines could not constitutionally govern the sentence.

Even in such cases, however, the court would not be free simply to ignore the guidelines. Under 18 U.S.C. § 3553(b),

> [i]n the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall . . . have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the policy statements of the Sentencing Commission.

Congress accordingly recognized that there would be cases in which the guidelines would not be directly applicable. Even in such cases, however, Congress directed that the court should give "due regard" to the applicable guidelines provisions and policy statements. The constitutionality of that provision is not called into question by Blakely, and there is every reason to believe that

Congress would have intended that it remain applicable even in cases in which the guidelines themselves cannot directly govern the sentence. Accordingly, even in cases in which the guidelines cannot constitutionally govern the sentence, the sentencing court should consider the sentencing range applicable under the most analogous guidelines provisions and give that range "due regard" in imposing sentence.

Similarly, the statutes providing for appellate review of sentences would continue to govern, even in cases in which the guidelines themselves cannot constitutionally govern the sentence. The government, for example, could still appeal on the ground that the sentence "was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable," 18 U.S.C. § 3742(b), and the court of appeals should reverse the sentence if it finds that the sentence was so imposed, 18 U.S.C. § 3742(f)(2). It is "plainly unreasonable" for a district court to fail to give "due regard" to the guidelines, as required by Section 3553(b). Accordingly, a court of appeals' determination of whether the sentence should be reversed under Section 3742(f)(2) should place significant weight on whether such regard was given.

Finally, even aside from those statutory commands, "[t]he Sentencing Commission has carefully developed the Guidelines over many years, and the Guidelines generally produce sentences that accord with the public's view of just punishment." Croxford, 324 F. Supp. 2d at 1248. Accordingly, the guidelines provide "useful instruction on the appropriate sentence," id., and sentencing courts should take them into careful consideration in imposing sentence even in cases in which, due to Blakely, it is held that the guidelines could not be applied as binding authority that governs the sentence.

Here, the guidelines take into account the number of victims, the young age of the victim, the way in which the defendant had access to the victims, the number of images, the conduct depicted in the images, the motivation of the defendant in receiving and distributing the images, and the sexual molestation of the victims by the defendant. These are certainly relevant considerations in fashioning an appropriate sentence. Thus, using the guidelines as "useful instruction," the Court should sentence the defendant to a sentence at the upper end of his guideline range of 262 to 327 months in imposing a sentence within the statutory maximum of 280 years imprisonment.

3. If the Court Rejects Both Arguments Above, the Government Requests a Sentencing Trial

In the alternative, the government requests that a sentencing trial to determine whether certain factors that have been sufficiently alleged in the indictment have been proven beyond a reasonable doubt by the government. In this case, the defendant has waived his right to have a jury determine which enhancements have been proven beyond a reasonable doubt, and has agreed to have this Court make that finding under a beyond a reasonable doubt standard. An unexecuted copy of that stipulation is attached at Tab 5. The original will be provided to the Court at the time of the sentencing hearing.

This procedure was authorized in United States v. Henry, 282 F.3d 242 (3d Cir. 2002). In Henry, the defendant entered a general plea to the offense of possession with intent to distribute a controlled substance. Although the indictment charged that he possessed cocaine base with intent to distribute, the defendant never admitted that, and insisted instead that the substance he possessed was marijuana. Id. at 244. The Court found that the identity and quantity

of the drug affected the defendant's maximum sentence, and accordingly under Apprendi (which was decided after the plea was entered) should have been submitted to a jury for resolution. The Court then concluded:

> We find it consistent with the mandate of Apprendi to remand for a jury to determine these facts beyond a reasonable doubt. This is what Henry requested in the District Court. We see no reason why a jury cannot be convened for the sole purpose of deciding the facts that will determine the sentence. After all, that is the job of the jury as fact-finder.

Id. at 253.

The same procedure applies where the defendant was previously convicted at a trial at which the sentencing factors were not submitted to a jury. The court so stated in United States v. Booker, 375 F.3d 508 (7th Cir.), cert. granted on other grounds, 125 S. Ct. 11 (2004). In that case, over the government's objection, the court held that Blakely applies to the federal guidelines and precludes the application of any enhancement which does not rest on a jury finding. The court then provided:

> Booker, unless he strikes a deal with the government, will be entitled to a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised. There is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial, in which the jury first determines liability and then, if and only if it finds liability, determines damages. Separate hearings before a jury on the issue of sentence is the norm in capital cases.

Id. at 514. Accord United States v. Ameline, 376 F.3d 967, 983-84 (9th Cir. 2004);[13] United States v. Landgarten, 325 F. Supp. 2d 234 (E.D.N.Y. 2004). See also United States v. Khan, 325 F. Supp. 2d 218, 226-27 (E.D.N.Y. 2004) (Judge Weinstein explains the historical basis for a sentencing jury, and concludes that a court may proceed by analogy to the use of a civil jury finding damages; "Where there is no specific rule on a subject covered in the Federal Rules of Criminal Procedure, the civil rule or practice may be borrowed. Rule 57(b) of the Federal Rules of Criminal Procedure explicitly provides that when there is no controlling law, 'a judge may regulate practice in any manner consistent with federal law'").

The government recognizes that, since Blakely, some observers have questioned whether a sentencing trial would amount to double jeopardy where a defendant, as is the case here, was convicted through a guilty plea or trial before Blakely was decided. But as Henry and Booker suggest, there is no such double jeopardy bar, as, with respect to the determination of sentencing facts, jeopardy did not terminate with the defendant's conviction for the counts of conviction. The Ninth Circuit explicitly so held in Ameline, 376 F.3d at 983-84.

Jeopardy did not terminate through the conclusion of the guilt phase of the case. As stated by the Seventh Circuit in Booker, it is common in capital prosecutions to commence a separate penalty phase. See Richardson v. United States, 468 U.S. 317, 325 (1984) ("the protection of the Double Jeopardy Clause by its terms applies only if there has been some event,

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[13] The Seventh Circuit in Booker did not resolve the severability question presented in the preceding section of this brief, leaving that for consideration on remand, and stated (as the government agrees) that a sentencing jury is warranted only if the government's severability position fails. 375 F.3d at 514-15. In Ameline, in contrast, the Ninth Circuit denied the government's severability argument and proceeded to advocate the use of a sentencing jury. The government respectfully disagrees with the central holdings in Booker and Ameline, and in fact successfully petitioned for certiorari in Booker with regard to its holding that Blakely applies to the federal guidelines. The Supreme Court also agreed to consider the severability question.

such as an acquittal, which terminates the original jeopardy."). See also People v. Saunders, 20 Cal. Rptr. 2d 638, 646 (1993) (the federal double jeopardy guarantee "is designed to prevent an accused from being placed at risk more than once on a single charge; it is not concerned with whether, in a bifurcated trial, a single jury or multiple juries are utilized").[14]

In this case, where the defendant is objecting to the imposition of sentence, it is appropriate to have a sentencing trial to assess the pertinent sentencing factors. It cannot be that the defendant may invoke Blakely, and assert that a sentencing factor may not be applied absent a jury determination, and then resist a sentencing trial for that purpose. To the contrary, the defendant's objection warrants a sentencing trial. This situation is akin to that which exists when a defendant challenges his sentence on appeal; in that context, the rule is that jeopardy continues and allows a new proceeding. For all of these reasons, if Blakely applies in this case and the government's other arguments are unsuccessful, it is appropriate to have a sentencing bench trial in this case to resolve the disputed sentencing factors.

The chart attached at Tab 6 contains a listing of the applicable sentencing enhancements. Column 2 outlines the sentencing range applicable if the Court determines that Blakely does not apply to the federal guidelines (262 to 327 months). Column 3 outlines the sentencing range applicable based on only those enhancements alleged in the indictment,

[14] In Sattazahn v. Pennsylvania, 537 U.S. 101 (2003), the Court stated that double jeopardy applies once a sentencing jury has addressed a sentencing fact which could increase the defendant's punishment. The Court noted that in light of Apprendi, for double jeopardy purposes, "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'" Id. at 111. Thus, "if a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstances.'" Id. at 112. This holding is not pertinent where, as here, at the time of the sentencing proceeding there has been no verdict on any sentencing fact terminating jeopardy. Indeed, in Sattazhan, the prosecution had initially sought life imprisonment and the jury had hung. On retrial, the government sought the death penalty. The Supreme Court held that there was no double jeopardy bar because the initial jury had hung.

assuming the government proves these enhancements beyond a reasonable doubt at the sentencing hearing (210 to 262 months). Finally, Column 4 outlines the sentencing range applicable based only on those enhancements alleged in the indictment and admitted by the defendant at the guilty plea hearing (151 to 188 months).

E. Government's Sentencing Recommendation

The government respectfully recommends that the defendant be sentenced to the upper range of his guideline range. Throughout this case, the defendant has failed to show any remorse for his actions and has denied that what he did to the victims in this case was wrong. Moreover, he entirely fails to appreciate the irreparable harm that has been caused to these young children as a result of his actions. This is best evidenced by defendant's own statements his expert witness, Dr. Sadoff. Dr. Sadoff writes the following about the defendant:

> Mr. Frank states he did not think he did anything wrong. He did not believe what he was doing was against the law. He also does not believe that he harmed anyone. He said that he has never been violent and doesn't think that he has harmed the young boys by his behavior. He states that there was no penetration, it was just oral sex, and he believes the boys were interested and enjoyed the experience.

Sadoff Report at 2. In fact, the victims in this case have been severely impacted by the defendant's conduct. Attached to this sentencing memorandum are letters from the guardians and/or parents of three of the children explaining the effect the defendant's actions have had on the children. See Tab 7 (victim impact statements to be filed under seal). These letters illustrate the irreparable harm caused by defendant's actions.

The government also requests that the Court sentence the defendant to a three-year period of supervised release. In addition to the standard conditions, the government requests that

the court also impose the following conditions: (i) the defendant shall not have any unsupervised contact with minors; (ii) the defendant shall not use any computer to access web sites, news groups, chat rooms, bulletin boards, file swapping services, internet clubs, to gain access to, view, exchange, possess, distribute, or receive child pornography; to communicate with other individuals regarding the production, receipt, or distribution of child pornography or sexual contact with minors; or to contact minors; (iii) the defendant shall be subject to the Probation Department's internet use monitoring; and (iv) the defendant shall continue to participate in a participate in a sex offender treatment program.

F. Request for Statement of Alternative Sentences

The government respectfully requests that regardless of which sentencing methodology the Court chooses, it state alternative sentences and express what sentence it would impose: (1) under the guidelines without regard to Blakely; (2) if the Court has discretion to impose sentence within the statutory range; and (3) under the guidelines if Blakely applies. It is anticipated that the result in this case will be appealed, and this expression will enable efficient and prompt resentencing in the event that later appellate developments reject the approach that the Court employs. See United States v. Dickerson, 2004 WL 1879764, at *6 n.9 (3d Cir. Aug. 24, 2003) ("given the uncertain future of the Guidelines . . . [o]n resentencing, the District Court may wish to announce an appropriate alternative non-Guideline sentence.").

CONCLUSION

For the reasons set forth above, the government respectfully requests that this Court impose a sentence of imprisonment near the upper end of his guideline range, a three-year period of supervised release, and an $1800 special assessment.

Respectfully submitted,

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Dated: November 16, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Sentencing Memorandum and the accompanying attachments has been served by United States first class mail on the following counsel:

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_____
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Dated: November 16, 2004